

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Ag Processing, Inc.,)	
Complainant,)	
)	
v.)	Case No. HC-2010-0235
)	
KCP&L Greater Missouri Operations)	
Company,)	
)	
Respondent.)	

**RESPONSE TO AG PROCESSING’S SUPPLEMENTAL INITIAL BRIEF ON
REMAND AND ADDITIONAL PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

KCP&L Greater Missouri Operations Company (“GMO”) responds briefly to Complainant Ag Processing, Inc.’s (“AGP”) Supplemental Initial Brief on Remand and its additional Proposed Findings of Fact and Conclusions of Law, filed January 7, 2013:

1. The Commission’s December 5, 2012 Order Directing Briefing stated that the “briefs shall address the issue as to whether AGP has satisfied the preponderance of the evidence standard with regard to its allegation of imprudence.” That allegation was that GMO had operated its natural gas hedging program imprudently. As the Order noted on page one, the Commission had found in its September 28, 2011 Report and Order that GMO was not imprudent in adopting or designing the hedging program.

2. However, because AGP addressed additional issues in its brief and submitted additional, new Proposed Findings of Fact and Conclusions of Law, GMO offers this response.

3. Subsequent to the evidentiary hearing, both AGP and GMO filed proposed findings of fact and conclusions of law in February 2011. Since the Court of Appeals expressed no view on substantive issues, GMO believes that its previously submitted proposed findings of

fact and conclusions of law provide a useful reference for the Commission should it find that AGP has failed to carry its burden of proof.

4. The Commission found and it is now law of the case that Aquila was not imprudent in adopting and designing its natural gas hedging program. See Report and Order, ¶ 25 at 9-10, ¶ 31 at 11. Applying the lower “serious doubt” burden of proof, the Commission held that AGP “failed to present sufficient evidence to create a serious doubt” about the adoption or design of Aquila’s steam hedging program. Id. The Commission cannot now find that AGP has met the higher preponderance of the evidence burden in demonstrating imprudence in the adoption or design of the steam hedging program.

5. Nevertheless, AGP spends most of its 2013 proposed findings of fact and its brief re-litigating these issues which it previously lost. See AGP’s Proposed Findings of Fact and Conclusions of Law at 1-10, 16-17; AGP’s Supplemental Initial Brief on Remand at 3-4, 9-28, 30-31, 32-8, 40.

6. AGP did not apply for rehearing of the Commission’s 2011 decisions on adoption or design of the hedging program under Section 386.500.1,¹ and neither of those issues were the subject of GMO’s appeal. The Commission’s determination that GMO was not imprudent in the adoption and design of its hedging program is the law of the case and cannot be revisited. See Hinton v. Director of Revenue, 21 S.W.3d 109, 113 (Mo. App. W.D. 2000); State ex rel. Hertzog v. Young, 937 S.W.2d 416, 421-22 (Mo. App. W.D. 1997). “In situations where there is a reversal after appeal, where not all appealable issues were appealed, a reversal . . . affects only the lower court issues that were appealed from Thus, if there is a severable portion of the judgment which is not appealed by the parties, a reversal of the case on the issues actually presented on appeal would not disturb or affect those other, severable, portions of the original

¹ Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2000), as amended.

judgment from which no appeal was taken.” Edmison v. Clarke, 61 S.W.3d 302, 308 (Mo. App. W.D. 2001).

7. Consequently, the only substantive factual issue before the Commission is the operation of the hedging program, which must be assessed under the preponderance of the evidence standard. See Report and Order Decision at 19.

8. If the Commission were to find that AGP failed to carry its burden of proof under this standard, the Commission must refund to GMO through the Quarterly Cost Adjustment (“QCA”) Rider the amount that was refunded to steam customers pursuant to the 2011 Report and Order. AGP has argued to the contrary at pages 5-6 and 8 of its brief that the Commission has no authority to return any amounts to GMO. However, the plain language of the QCA Rider states that “[o]ther fuel cost refunds, or credits related to the operation of this rider may also flow through this reconciliation process, as ordered by the Commission.” See QCA Rider Sheet No. 6.2. Therefore, if the Commission finds that AGP has failed to meet its burden of proof, the funds improperly refunded must be restored to GMO through the QCA.

9. Precedent for a reversal of refunds is found in State ex rel. Laclede Gas Co. v. PSC, 156 S.W.3d 513, 522-23 (Mo. App. W.D. 2005), where the Court of Appeals affirmed a circuit court decision that reversed the Commission’s order regarding amounts earned by the utility under a natural gas hedging program. Finding that the Commission erred by flowing these amounts to customers in an Actual Cost Adjustment proceeding under Laclede’s Purchased Gas Adjustment program, the Court of Appeals remanded the case to the Commission. Id. at 517, 523. The Commission thereafter directed Laclede to adjust its account balances so that it “may retain those proceeds.” In re Laclede Gas Co. Purchased Gas Adjustment Tariff Revisions, Order on Remand at 2, No. GR-2001-387 (Apr. 7, 2005).

10. Finally, AGP is incorrect that GMO has given up any right to reverse the refunds provided to the steam customers because it complied with the Commission's order to provide the refund under the QCA. See In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, Order Rejecting Tariff and Requiring the Filing of a New Tariff, No. HT-2011-0343 (Nov. 22, 2011); id., Order Approving Compliance Tariff Sheet (Dec. 29, 2011). Under Section 386.520.1, a pending appeal under Section 386.510 does not stay or suspend the operation of a Commission order. GMO was, therefore, obligated to begin refunding the amount determined by the Commission to its steam customers. This is consistent with other provisions of the Public Service Commission Law, stating that every order of the Commission continues in force until changed or abrogated by it, or otherwise found to be unlawful. See Section 386.490.3.

11. While an appeal bond is a prerequisite to staying the execution of a Commission order on appeal, it is not a prerequisite to the filing of an appeal and does not affect the rights preserved on appeal. See Sections 386.520.1, 512.080.1(2). Moreover, unlike the posting of a supersedeas bond relating to judgments in the circuit courts under Missouri Rule of Civil Procedure 81.09, stays of Commission orders are only granted upon a showing "that great or irreparable damage would otherwise result to the appellant."

WHEREFORE, GMO respectfully requests that the Commission find that the operation of the gas hedging program was not imprudent and to reverse the refunds previously ordered.

Respectfully submitted,

/s/ Karl Zobrist

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Certificate of Service

A copy of the foregoing has been emailed this 15th day of January 2013 to all counsel of record.

/s/ Lisa A. Gilbreath

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